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Suite 600
Washington, DC 20003-3960

① +1.202.654.6200
② +1.202.654.6211
perkinscoie.com

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Marc-Erik Elias

MElias@perkinscoie.com

OFFICE OF GENERAL
COUNSEL
P: (202) 424-1609
F: (202) 654-9126

BY HAND DELIVERY

Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E. Street N.W.
Washington, D.C. 20463

Re: MUR 7142

Dear Mr. Jordan:

We write as counsel to Evan Bayh, the Evan Bayh Committee ("the Committee") and Dennis Charles, Treasurer, (collectively, "Respondents") in response to the Complaint filed by the Foundation for Accountability and Civic Trust on September 19, 2016, alleging a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") or Commission regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with Senate Majority PAC in connection with advertisements regarding the U.S. Senate race in Indiana. The Commission has made clear on numerous occasions that the activity alleged in the Complaint does not constitute "coordination" for purposes of the Act. As the Complaint does not allege any facts to demonstrate that coordination took place, and because no coordination took place, the Commission should find no reason to believe that Respondents violated the Act and dismiss the Complaint.

FACTUAL BACKGROUND

The Complaint alleges that the Committee is instructing organizations to run advertisements through "obscure pages" on its website. This is not true. The Committee posted numerous messages on its publicly available website, including those under the heading "Hoosiers Need to Know," and updated those messages throughout the election cycle.

Contrary to the Complaint's assertion that these were "obscure pages" on the Committee's website, the original messages were typically posted, at least in part, on the top of the Committee's home page, with a link to a separate page on the Committee's website containing more information. Any suggestion in the Complaint that messages posted on www.evanbayhforindiana.com were somehow "obscure" is meritless. These messages were part of the Committee's strategy to communicate information about Evan Bayh, or his opponent, to the general public.

According to publicly available information, Senate Majority PAC did air advertisements in Indiana in connection with the U.S. Senate race, including the advertisement identified in the Complaint regarding Congressman Todd Young's position on Social Security. The sole basis for the allegation in the Complaint is the thematic similarity between this advertisement and a message posted on the Committee's website about the same topic. As the Commission is no doubt aware, Social Security is a major policy issue that has a bearing on the quality of life and economic well-being of retirees. Congressman Young's position provided an important contrast between he and Evan Bayh that the Committee believed was a critical part of its message. Further, the specific language used in the Senate Majority PAC advertisement does not appear to resemble the language identified in the Complaint on the "Hoosiers Need to Know" webpage, nor does the Complaint allege that Senate Majority PAC republished campaign material.

Other than the thematic similarities between the Committee's message and the Senate Majority PAC advertisement, the Complaint does not present any evidence of coordination between the Committee and Senate Majority PAC. And, in fact, there was no coordination. The Committee did not request or suggest that Senate Majority PAC create the advertisements; the Committee did not have any involvement in the creation, production, or dissemination of the advertisements; and the Committee did not discuss with Senate Majority PAC the Committee's plans, projects, activities or needs.

LEGAL ANALYSIS

A. The Complaint Does Not Allege Facts Establishing that the Advertisement at Issue was a Coordinated Communication

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong, and the conduct prong. The Complaint does not allege facts that demonstrate that the conduct prong was satisfied in connection with the advertisement identified, nor does it allege facts that otherwise suggest coordination.

The allegation of coordination in the Complaint stems entirely from a posting on the Committee's publicly available website and an advertisement run by Senate Majority PAC on a similar topic. But the Commission has clearly explained that thematic similarities between a third party advertisement and campaign materials are "reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination." See MUR 5669, Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner. There is no indication of such prior coordination presented here. Further, in a recent enforcement action, the Commission specifically found that a campaign website and a third party

advertisement sharing similar themes “alone is not enough to suggest coordination.” See MUR 6821.

Here, it is no surprise that the Committee and Senate Majority PAC would both criticize Congressman Young for his position on Social Security. In fact, his position on Social Security was a liability for Congressman Young in his congressional election in 2012, during which his opponent criticized him in the same way. This is precisely the type of similar messaging the Commission was addressing in the matters referenced above; any entity engaged in any way in the U.S. Senate race in Indiana was inevitably going to focus on Congressman Young’s position on Social Security. That fact alone simply is not enough to support an allegation of coordination.

B. The Conduct Prong Has Not Been Satisfied

The Complaint alleges that, with respect to the advertisement at issue, the “request or suggestion” aspect of the conduct prong was satisfied. This assertion is simply incorrect as a matter of law. The Commission’s regulations and its interpretation of those regulations on numerous occasions make clear that communications appearing on a campaign’s publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a “request of suggestion” that a third party disseminate a communication on its behalf. 11 C.F.R. § 109.21(d)(1). In the accompanying Explanation and Justification, the Commission clarified that:

The “request or suggestion” conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public general. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a selection audience and thereby satisfies the conduct standard in paragraph (d)(1).

Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). A request or suggestions made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech, is not a coordinated communication if that

information is subsequently used in connection with a communication.” Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

Most recently, the Commission re-affirmed this basic principle in response to a complaint with facts nearly identical to those presented in the Complaint. *See* MUR 6821. That complaint alleged that a coordinated communication occurred when Senate Majority PAC began to air an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”

Here, as was the case in MUR 6821, the message identified in the Complaint was posted on the publicly available website of the Committee. Accordingly, such posting alone cannot be a basis to find that the advertisement identified in the Complaint satisfied the conduct prong. And the Complaint does not allege any other facts to demonstrate that the conduct prong has been satisfied.

C. The Commission Must Reject the Complaint’s Request for an Investigation

Notwithstanding that it fails to allege specific facts showing a violation of the Act or Commission regulations, the Complaint requests an investigation to determine whether there was, in fact, coordination between the Committee and Senate Majority PAC. The Act does not allow the Commission to engage in such a fishing expedition.

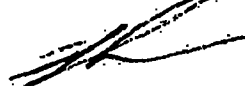
The Act requires the Commission to find “reason to believe that a person has committed, or is about to commit, a violation” of the Act as a precondition to opening an investigation into the alleged violation. 52 U.S.C. § 30109(a)(2). In turn, the Commission may find “reason to believe” only if a complaint sets forth specific un rebutted facts, which, if proven true, would constitute a violation of the Act. *See* 11 C.F.R. §§ 111.4(a), (d); MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *Id.*

The Complaint does not set forth sufficient specific un rebutted facts, which, if proven true, would constitute a violation of the Act. For the reasons set forth herein, the specific facts that it does allege—that the Committee posted the messages on its publicly available website and that Senate Majority PAC aired an advertisement in Indiana with thematic similarities—do not constitute a violation of the Act.

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The Commission must therefore reject the Complaint's request for an investigation. It should instead dismiss the Complaint and close the file.

Very truly yours,



Marc Erik Elias